

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

CHARLES LEE RANDOLPH,

Petitioner,

v.

WILLIAM GITTERE, *et al.*,

Respondents.

Case No. 3:08-cv-00650-LRH-CLB

ORDER

Before the Court in this capital habeas corpus action is a motion by the petitioner, Charles Lee Randolph requesting that the action be stayed while he exhausts claims in state court (ECF No. 122) and a motion by the respondents requesting a more definite statement by Randolph regarding his exhaustion in state court of the claims in his second amended petition for writ of habeas corpus (ECF No. 121). The Court will grant Randolph's motion for a stay and stay this action, and the Court will deny Respondents' motion for a more definite statement as moot.

In 2000, Randolph was convicted of several crimes, including conspiracy, burglary, robbery, first-degree kidnapping, and first-degree murder, involving a killing at a Las Vegas bar on May 5, 1998. Randolph was sentenced to death for the murder. Randolph's direct appeal to the Nevada Supreme Court and two state-court habeas petitions have been unsuccessful. Randolph was represented by the same appointed counsel—James Colin—in both of his state habeas actions.

In this Court, after completion of his second state habeas action, Randolph filed a first amended petition for writ of habeas corpus on November 13, 2017. ECF No. 37. Respondents filed a motion to dismiss, and, on February 25, 2019, the Court granted that motion in part and denied it in part, dismissing one of Randolph's claims and ordering Respondents to file an answer. ECF No. 59.

1 Before Respondents filed their answer, however, Colin filed a response to a motion
2 for extension of time that was replete with unprofessional, inflammatory rhetoric, and that
3 repeatedly expressed concern regarding his own interests. See ECF No. 61. On July 29,
4 2019, in view of that filing, the Court discharged Colin from his representation of
5 Randolph. ECF No. 64. On October 15, 2019, the Court appointed new counsel—the
6 Federal Public Defender for the District of Idaho (FPD)—to represent Randolph, and the
7 Court set a schedule for Randolph, with his new counsel, to file a second amended
8 habeas petition. ECF No. 67.

9 On August 9, 2019, Randolph filed, *pro se*, a motion requesting leave of court to
10 represent himself and requesting that his action proceed without delay on his first
11 amended petition. The Court denied that motion in the October 15 order, without prejudice
12 to Randolph filing a new motion requesting leave to proceed *pro se* after he had the
13 opportunity to consult with his new counsel. See ECF No. 67. On November 4, 2019,
14 Randolph filed two more *pro se* motions: a “Motion for Leave to Proceed Pro Se” (ECF
15 No. 71) and a “Verified Motion for Order to Terminate FPD [and] Invocation of Right to
16 Self-Representation [and] Demand for an Immediate End to Unnecessary Unwanted
17 Suspension of Proceedings” (ECF No. 72). In those motions, Randolph renewed his
18 request for leave of court to represent himself and his request that this action proceed on
19 his first amended petition. On November 26, 2019, the Court held a hearing to hear from
20 Randolph, the FPD, and Respondents regarding Randolph’s motions. At the hearing,
21 Randolph reiterated his requests that the FPD be discharged, that he be allowed to
22 proceed *pro se*, and that the action proceed on the first amended petition. On December
23 3, 2019, however, the FPD filed for Randolph a motion (ECF No. 76) requesting leave to
24 withdraw his previous motions. In that motion, counsel notified the Court that Randolph
25 had a change of heart and wished for the FPD to represent him and file a second
26 amended habeas petition on his behalf. On December 9, 2019, the Court granted
27 Randolph’s motion to withdraw his *pro se* motions. ECF No. 77.

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1 On March 24, 2020, Randolph moved for leave to conduct discovery and for
 2 disclosure of certain materials by Respondents (ECF Nos. 79, 89), and, after extensive
 3 litigation, those motions were resolved on April 1, 2022 (see ECF Nos. 84, 98, 106).
 4 Randolph then filed his second amended petition for writ of habeas corpus on May 12,
 5 2023. ECF Nos. 116, 120.

6 On July 7, 2023, Respondents filed their motion for a more definite statement. ECF
 7 No. 121. And, on July 20, 2023, Randolph filed his motion for a stay. ECF No. 122. The
 8 parties have fully briefed those motions. See ECF Nos. 123, 124, 125, 126.

9 Randolph represents in his motion for a stay that he “intends to file an exhaustion
 10 petition in state court as soon as possible, and respectfully requests this Court grant a
 11 stay of the federal proceedings pending exhaustion of those claims that were not raised
 12 by prior state and federal habeas counsel.” ECF No. 122 at 1.

13 In *Rhines v. Weber*, 544 U.S. 269 (2005), the United States Supreme Court
 14 circumscribed the discretion of federal district courts to impose stays to facilitate habeas
 15 petitioners’ exhaustion of claims in state court. The *Rhines* Court stated:

16 [S]tay and abeyance should be available only in limited circumstances.
 17 Because granting a stay effectively excuses a petitioner’s failure to present
 18 his claims first to the state courts, stay and abeyance is only appropriate
 19 when the district court determines there was good cause for the petitioner’s
 20 failure to exhaust his claims first in state court. Moreover, even if a petitioner
 21 had good cause for that failure, the district court would abuse its discretion
 if it were to grant him a stay when his unexhausted claims are plainly
 meritless. Cf. 28 U.S.C. § 2254(b)(2) (“An application for a writ of habeas
 corpus may be denied on the merits, notwithstanding the failure of the
 applicant to exhaust the remedies available in the courts of the State”).

22 * * *

23 [I]t likely would be an abuse of discretion for a district court to deny a stay
 24 and to dismiss a mixed petition if the petitioner had good cause for his failure
 25 to exhaust, his unexhausted claims are potentially meritorious, and there is
 no indication that the petitioner engaged in intentionally dilatory litigation
 tactics. In such circumstances, the district court should stay, rather than
 dismiss, the mixed petition.

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 27 *Rhines*, 544 U.S. at 277–78. *Rhines* does not state, or suggest, that every unexhausted
 28 claim in the petition must satisfy, individually, the “good cause” and “potentially

1 meritorious” requirements before a stay is permitted. If a stay is warranted with respect
2 to any single claim, the court need not conduct a claim-by-claim analysis regarding the
3 remaining claims.

4 Randolph concedes in his second amended petition, and there is no real dispute,
5 that his claims of ineffective assistance of trial counsel—Claims 1, 2, 3 of his second
6 amended petition—have not been presented in state court, either in whole or in part. See
7 ECF No. 116 at 39; *see also* ECF No. 123 at 4–5. Randolph’s second amended petition
8 is plainly a “mixed petition,” meaning it is in part exhausted and in part unexhausted in
9 state court. The Court determines, further, that Randolph’s unexhausted claims of
10 ineffective assistance of trial counsel are at least potentially meritorious within the
11 meaning of *Rhines*. And there is no showing that Randolph has engaged in intentionally
12 dilatory litigation tactics warranting denial of his motion for stay.

13 Regarding the question of cause for his failure to exhaust all the claims in his
14 second amended petition, Randolph asserts that the attorney who handled both of his
15 previous state habeas actions performed ineffectively in not presenting, or in not properly
16 presenting, the claims of ineffective assistance of trial counsel that he asserts in his
17 second amended petition. In *Martinez v. Ryan*, 566 U.S. 1 (2012), the Supreme Court
18 held that “[w]here, under state law, claims of ineffective assistance of trial counsel must
19 be raised in an initial-review collateral proceeding, a procedural default will not bar a
20 federal habeas court from hearing a substantial claim of ineffective assistance at trial if,
21 in the initial-review collateral proceeding, there was no counsel or counsel in that
22 proceeding was ineffective.” *Martinez*, 566 U.S. at 17. In *Blake v. Baker*, 745 F.3d 977
23 (9th Cir. 2014), the Ninth Circuit Court of Appeals held that the sort of ineffective
24 assistance of counsel in an initial-review collateral proceeding described in *Martinez* can
25 be good cause for a *Rhines* stay. *See Blake*, 745 F.3d at 982–84. Here, the Court finds
26 that Randolph has shown good cause, under *Rhines*, for his failure to fully exhaust in
27 state court his claims of ineffective assistance of trial counsel.

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1 Therefore, the Court determines that the requirements for a stay of this action
2 pending exhaustion of Randolph's claims in state court, as set forth in *Rhines*, are
3 satisfied. The Court will grant Randolph's motion for a stay (ECF No. 122) and stay this
4 action.

5 In exercising its discretion to grant this stay, the Court determines that there is a
6 possibility that the Nevada courts may consider, on their merits, Randolph's unexhausted
7 claims of ineffective assistance of trial counsel, upon a showing of ineffective assistance
8 of his prior post-conviction counsel. See *Crump v. Warden*, 113 Nev. 293, 934 P.2d 247
9 (1997).

10 The Court's intention is that this will be the last time that the Court imposes a stay
11 to facilitate Randolph's exhaustion of claims in state court. Randolph must exhaust all his
12 unexhausted claims in state court during this stay.

13 The Court will deny Respondents' motion for a more definite statement (ECF No.
14 121) as moot, as, when the stay of this action is lifted upon the completion of Randolph's
15 further state court proceedings, the Court will call for Randolph to file a third amended
16 habeas petition accounting for the further state court proceedings.

17 **IT IS THEREFORE ORDERED** that Petitioner's Motion to Hold Federal Habeas
18 Proceedings in Abeyance (ECF No. 122) is **GRANTED**. This action is **STAYED**, while
19 Petitioner exhausts in state court his unexhausted claims for habeas corpus relief.

20 **IT IS FURTHER ORDERED** that, on or before December 15, 2023, Petitioner shall
21 file a status report, describing the status of his state court proceedings. Thereafter, during
22 the stay of this action, Petitioner shall file such a status report every 6 months (on or
23 before June 15, 2024; December 15, 2024; etc.). Respondents may, if necessary, file and
24 serve a response to any such status report within 15 days after it is filed. If necessary,
25 Petitioner may reply within 15 days after the response is filed.

26 **IT IS FURTHER ORDERED** that, following the conclusion of Petitioner's state
27 court proceedings, Petitioner shall, within 30 days, make a motion to lift the stay.

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1 **IT IS FURTHER ORDERED** that this action will be subject to dismissal upon a
2 motion by Respondents if Petitioner does not comply with the time limits in this order, or
3 if he otherwise fails to proceed with diligence during the stay imposed pursuant to this
4 order.

5 **IT IS SO ORDERED.**

6 DATED THIS 23rd day of August, 2023.

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9 LARRY R. HICKS
10 UNITED STATES DISTRICT JUDGE
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